



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 19, 1998

Ms. Cathy Cunningham  
Senior Assistant City Attorney  
City of Irving  
P.O. Box 152288  
Irving, Texas 75015-2288

OR98-0485

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111826.

The City of Irving (the "city") received an open records request for the following information:

- 1) a list of the employee lawsuits filed against the city of Irving since 1991;
- 2) a list of hires since 1992;
- 3) total amount of money billed so far by Haynes and Boone on the Debra May case;
- 4) Agendas for all Self Insured Claims Board Meetings since 1993;
- 5) list of city files on database;
- 6) any memos from Crystal Johns, Sandy Cash, or Douglas Bales to Steve McCullough regarding the city taking the direct control of the Irving Convention and Visitors Bureau; and,
- 7) all transcripts of interviews with ICVB employees regarding Debra May and allegations of Marijuana use within the ICVB.

In response to the request, you submitted to this office for review the information you assert is responsive. You assert that the city has located certain responsive records to categories 2, 3, and 4, which have been or will be released to the requestor. You further contend that the request for information under category 5 has been withdrawn, and that the information

requested by category 1 of the request does not exist, although other responsive documents will be released. However, you claim that the remaining information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>1</sup> We have considered the exceptions and arguments you have raised and reviewed the submitted information.

Initially, we note that if the requested records overlap with any information which was the subject of our previous rulings in Open Records Letter Nos. 96-2477 (1996) and 96-1781 (1996), then the city should withhold or release this information as directed in the previous rulings. A copy of the previous related rulings is enclosed for your convenience.

We first consider your assertion that the city does not possess a specific list of employee lawsuits in response to Item 1 of the request. We note that Chapter 552 of the Government Code does not apply to information that does not exist. See Open Records Decision No. 555 (1990). Nor does chapter 552 require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, writ dismissed); see also Open Records Decision No. 87 (1975). However, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision Nos. 561 (1990), 555 (1990), 379 (1983), 347 (1982). Although you indicate that certain records have been released in order to comply with this request, we note that where there are no responsive records, you need not further comply with category 1 of the request.

We next address the application of section 552.103 to the requested information. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 551 (1990)

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<sup>1</sup>We note that although the city raises section 552.101 as a basis for asserting the protection of a protective order, we will consider the city's arguments concerning the protective order under section 552.107(2).

at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a). In this instance, you have demonstrated that there is pending litigation. After reviewing the submitted materials, we also conclude that the information at issue relates to that pending litigation. The city may, therefore, withhold most of the requested information pursuant to section 552.103.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Our review of the submitted records indicates that some of the information at issue has already been seen by the opposing party in the pending litigation. Specifically, since the submitted sworn statements of the victim of the alleged sexual harassment have already been seen by the opposing party in the pending litigation, we believe that section 552.103 does not protect such information. Therefore, we are obliged to address the public disclosure of such information under the remaining claimed exceptions, specifically the protective order and the common law right to privacy.

Section 552.107(2) states that information is excepted from required public disclosure if "a court by order has prohibited disclosure of the information."<sup>3</sup> This office has interpreted this language as protecting only information that a court has specifically ordered not to be disclosed, *i.e.*, information subject to a protective order. *See, e.g.*, Open Records Decision Nos. 309 (1982), 143 (1976). You have provided this office with the "Agreed Protective Order" as to the disclosure of certain documents, which was signed by the court on May 20, 1997. The protective order mandates that certain documents "shall be deemed 'Confidential Information.'" Agreed Protective Order, *Debra C. May v. City of Irving*, No. 96-12229 (G-134th Dist. Ct., Dallas County, Tex. May 20, 1997).

Generally, this office concludes that to the extent that release of information would violate the terms of an applicable protective order, the governmental body must withhold those records pursuant to section 552.107(2). Open Records Decision No. 415 (1984). However, upon review of the protective order, we note that several sections of the order specifically exclude certain types of information or documents from the order's purview. Section 4 of the order provides the following:

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<sup>2</sup>The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We note, however, that some of the requested information may be confidential and will be protected from disclosure even after litigation has concluded. *See* Gov't Code § 552.352 (distribution of confidential information is criminal offense).

<sup>3</sup>Ordinarily, a governmental body may not contract to keep information confidential, even if the governmental body does so by means of a settlement agreement. Information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977).

(c) This Order shall not apply to documents which either Party has received from other sources or which are already in the possession of either Party.

....

(g) Nothing contained in this Order shall preclude any party from using its own confidential documents in any manner it sees fit, or from revealing such confidential documents or information to whomever it chooses, without prior consent of any other party or of this Court.

We believe that the submitted protective order does not make the entire range of information sought in the request confidential or otherwise seal it. See Gov't Code § 552.107(2). Therefore, based on the submitted records, we conclude that the protective order does not protect the sworn statements of the victim of the alleged harassment.

Finally, we address your assertion that common-law privacy protects portions of the information submitted for our review. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses both common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Industrial Foundation*, 540 S.W.2d at 683. Specifically, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment.

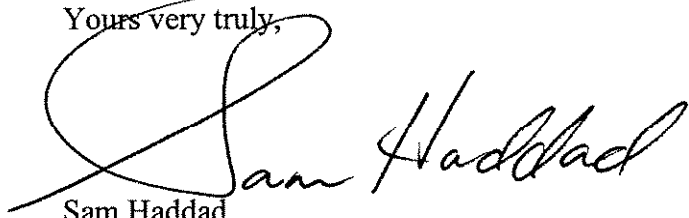
Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We conclude that portions of the submitted information constitute highly intimate or embarrassing information, which is protected from disclosure by privacy as applied in *Ellen* and *Industrial Foundation*. We have marked a representative sample of the types of information which must be withheld based on privacy under section 552.101. The remaining information is not protected by privacy under section 552.101 of the Government Code and, therefore, must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref: ID# 111826

Enclosures: Marked records  
Open Records Letter Nos. 96-2477 (1996) and 96-1781 (1996)

cc: Mr. Sam Templeton  
Paragon News 15  
135 Houston Street  
Lewisville, Texas 75075  
(w/o enclosures)